

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC

And

Case No. 5-CA-31828

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES
& TECHNICIANS, COMMUNICATIONS WORKERS OF
AMERICAN, LOCAL 31, AFL-CIO,

And

CNN AMERICA, INC. AND TEAM VIDEO SERVICES, LLC

And

Case No. 5-CA-33125
(formerly 2-CA-36129)

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES
& TECHNICIANS, COMMUNICATIONS WORKERS OF
AMERICAN, LOCAL 11, AFL-CIO.

CNN AMERICA, INC.'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Respondent, CNN America, Inc. ("CNN"), hereby moves for leave to file a supplemental brief in support of its Motion to Strike Appendices E-S ("Appendices") to the General Counsel's Answering Brief. The General Counsel's July 8, 2009 response offers explanations as to several of the appendices' deviations from the record evidence they purport to summarize. Far from resolving the numerous questions surrounding the content and accuracy of the General Counsel's appendices, these new assertions—like the Appendices—require a response from CNN in order fully to frame the issues before the Board. In support of its motion, CNN states as follows:

1. The charges in this case were filed in 2004. Nearly four years later, after several iterations of the original complaint, a hearing began in December, 2007 that lasted eight months. The record from the hearing contains more than 16,000 pages of testimony and approximately 1,300 exhibits, many of them several volumes in length. As part of its briefing to the Board, the

General Counsel requested permission to file appendices that would “condense, in single-spaced table format, the large amount of data and information (*e.g.*, interview comments and interview scores) contained in the dozens of volumes of hiring and personnel records entered into the record” and “will not be argument, but rather evidentiary summaries.” GC Request of Mar. 6, 2009 at 2, 3. The Associate Executive Secretary permitted the parties to file appendices to their briefs “summarizing documentary evidence ... with the understanding that the appendices will not contain any argument.” March 19, 2009 Order (emphasis added). The Associate Executive Secretary reaffirmed these requirements in his March 31, 2009 order. The Board—both in its decisions and Rules— similarly provide that an appendix may not contain argument or be used to circumvent the limits imposed on briefs. *See* NLRB Rules & Regulations § 102.46; *see also Pacific Beach Corp.*, 344 NLRB 1160, 1160 (2005).

2. The enormous size of the record in the case makes the content of “summary” appendices an issue of importance, due to the potential for the appendices to be used as substitutes for the evidence in the record. Several of the General Counsel’s responses in defense of their Appendices require additional briefing from CNN in order fully to frame the issues before the Board. The General Counsel concedes that its Appendices were designed to support its “theory of hiring discrimination” and that they contain numerous omissions and inaccuracies. *See* GC Response at 2. The General Counsel also admits that it filtered, modified, and supplemented the documentary evidence to create appendices that best served its case. *Id.* at 2-4. The manipulation of evidence to support of a legal theory is argument and is not the kind of general “summary” for which the General Counsel asked and which the Associate Executive Secretary approved. *See* GC Request of Mar. 6, 2009 at 2, 3; Assoc. Exec. Sec’y Orders of Mar. 19, 2009 and Mar. 31, 2009; NLRB Rules and Regulations § 102.46.

3. Accordingly, CNN respectfully requests to file the attached supplemental brief in support of CNN's Motion to Strike.

Respectfully Submitted,


PAUL, HASTINGS, JANOFSKY & WALKER LLP

Zachary D. Fasman, Esq.
Sandi F. Dubin, Esq.
75 E. 55th Street
New York, NY 10022
(212) 318-6000

Kenneth M. Willner, Esq.
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1700

Maureen E. O'Neill, Esq.
1117 South California Avenue
Palo Alto, CA 94304

Todd C. Duffield, Esq.
600 Peachtree Street, N.E.
Suite 2400
Atlanta, GA 30308

Lisa H. Reeves
Turner Broadcasting System, Inc.
One CNN Center
Atlanta, GA 30303

**COUNSEL FOR RESPONDENT
CNN AMERICA, INC.**

Attachment

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**CNN AMERICA, INC.'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION TO
STRIKE AND IN REPLY TO THE GENERAL COUNSEL'S RESPONSE**

On July 8, 2009, the General Counsel filed a response ("GC Response") to CNN's Motion to Strike Appendices E-S to the General Counsel's Answering Brief for failure to comply with the conditions imposed by the Associate Executive Secretary and the Rules and Regulations of the National Labor Relations Board ("Board"). The General Counsel concedes that Appendices E-S ("Appendices") are argumentative, incomplete, and inaccurate.¹ See GC Response at 2-4. The explanations and justifications of these shortcomings do not resolve the significant problems posed by the Appendices. Instead, they confirm the severity of their deficiencies and validate CNN's objections that they have no place in the record before the Board. Offered by the General Counsel as a "useful road map" to "aid the reader of the record in reviewing ... the hiring documents," GC Response at 2, the one-sided Appendices are an

¹ The General Counsel has already acknowledged that its freelancer appendices were inaccurate. See GC Reply Br. at 10 n.8.

extension of the General Counsel's briefs in chart form. They should, therefore, be stricken from the record.

The General Counsel concedes that its Appendices do not summarize all of the hiring applicants and that it excluded approximately three dozen candidates because they did not fit its "theory of hiring discrimination." GC Response at 2. Selectively excluding candidates that do not support a legal theory is argument relegated by Board Rules to briefs. *See* NLRB Rules and Regulations § 102.46. The Appendices also violate the orders of the Associate Executive Secretary, who allowed the parties to file appendices to their briefs "summarizing documentary evidence ... with the understanding that the appendices will not contain any argument." Assoc. Exec. Sec'y Orders of Mar. 19, 2009 and Mar. 31, 2009 (emphasis added).

The General Counsel maintains that the selectivity of its Appendices does not diminish their accuracy. *See* GC Response at 2. The filtered presentation of portions of evidence as a complete summary of the record is inherently incomplete and argument—it includes only documents that support a legal theory, ignores evidence that does not, yet is presented as a full, unbiased summary of evidence. Admitting these deficiencies in a submission to the Board does nothing to remove the argument or include excluded applicants. Moreover, contrary to the General Counsel's assertions that the omitted candidates were not a part of its case, the names of several of the excluded candidates—such as John Cunha—appear repeatedly throughout the testimony. *See, e.g.*, Tr. 2269-2278; 2307-08; 2409-12; 2483-84; 2852-54; 2061; 2072-74 (questioning regarding John Cunha's application and participation in the hiring process).

The General Counsel also admits that the "average" scores it created and included in the Appendices are not in the record and were not used by CNN. *See* GC Response at 2. The General Counsel also does not dispute CNN's objections that the averages in the appendices are

replete with mathematical errors. *Id.* To defend its averages, the General Counsel argues that it has never claimed the figures were in the record or used by CNN and that they should not be stricken because they provide a “basis of comparison” between the candidates. *Id.* The averages are not objectionable because of what the General Counsel did or did not say about them, but rather because the General Counsel created them using evidence from the record that it had previously modified, and then included them in a document presented as an objective summary of the evidence. Information containing arithmetic errors and that is merely “based on” evidence is not evidence and is utterly unreliable. It has no place contaminating the record. Finally, the averages are not a helpful basis of comparison between all the candidates because the Board did not generate them for all of the applicants in its Appendices, much less the three dozen candidates who were omitted.

The General Counsel attempts to dismiss CNN’s objections to its calculations of candidates’ “years of experience” as merely CNN’s “assertion regarding what happened at the selection process.” GC Response at 3. If so, then the Appendices must be the General Counsel’s version of events, creating a factual dispute between the parties properly resolved in briefs. Regardless of the clarity of the General Counsel’s expression of its legal position, the “years of experience” figures omit the primary sources of information regarding experience on which the hiring managers testified they relied: the resumes and interview guides. *See, e.g.*, Tr.14585-86; 13236-37; 10232; 10245; 10307. They also fail to identify the source of the General Counsel’s estimates and the standards by which the General Counsel calculated experience in the instances where the phone screen notes and emailed highlights of those notes do not indicate specific categories of experience. A non-argumentative evidentiary summary would accurately record all these sources of experience in CNN’s “hiring files.” The General Counsel concedes that its Appendices do not.

The General Counsel acknowledges that it reordered, reformatted, and otherwise altered the presentation of the content of the documentary evidence, but attempts to justify these alterations by contending there is no evidence of how the hiring managers weighed a “descriptive phrase or adjective” based on its location in a sequence. *See* GC Response at 3. The factual summaries of hiring materials purport to be a convenient reproduction of documentary evidence so that the Board could, in one compilation, review the documents used by the hiring managers as they saw them and evaluate the decisions that were made. This is not possible when the summaries reorganize and edit the documents’ content. These alterations are particularly objectionable because of their pattern—calculated to support the General Counsel’s “theory of hiring discrimination.” *See* GC Response at 2, 3. They enhance the strengths and ignore the weaknesses of Team candidates. With respect to non-Team hires, strengths are omitted and the weaknesses are accentuated. The General Counsel does not deny the effect of these changes and concedes that the purpose of the Appendices was to argue its theory of the case.² *See* GC Response at 2, 3.

Put simply, the General Counsel concedes that the Appendices were designed to support its “theory of hiring discrimination” and that they contain numerous omissions and inaccuracies. *See* GC Response at 2. The General Counsel also admits that it filtered, modified, and supplemented the documentary evidence to create appendices that best served their case. *Id.* at 2-4. The manipulation of evidence to support a legal theory masquerading as a complete summary is argument, and surely is not the general “summary” for which the General Counsel asked and the Associate Executive Secretary approved. *See* GC Request of Mar. 6, 2009 at 2, 3;

² The General Counsel also admits that, contrary to its assertions in the Appendices, CNN did produce the documents in GC Exhibits 152 and 153. Although the General Counsel questions the use of these documents in its response, the uncontested evidence in the record demonstrates they were transcribed. Tr. 13240-43; 15851-54; GC Ex. 153; GC Response at 4.

Assoc. Exec. Sec'y Orders of Mar. 19, 2009 and Mar. 31, 2009; NLRB Rules and Regulations

§ 102.46. Accordingly, CNN respectfully requests that the improper Appendices be stricken.

Respectfully Submitted,


PAUL, HASTINGS, JANOFSKY & WALKER LLP

Zachary D. Fasman, Esq.
Sandi F. Dubin, Esq.
75 E. 55th Street
New York, NY 10022
(212) 318-6000

Kenneth M. Willner, Esq.
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1700

Maureen E. O'Neill, Esq.
1117 South California Avenue
Palo Alto, CA 94304

Todd C. Duffield, Esq.
600 Peachtree Street, N.E.
Suite 2400
Atlanta, GA 30308

Lisa H. Reeves
Turner Broadcasting System, Inc.
One CNN Center
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AFFIDAVIT OF SERVICE

Eric Engberg, being duly sworn, deposes and says as follows:

1. I am over 18 years of age, am not a party to this proceeding, and am employed by the law firm of Paul, Hastings, Janofsky & Walker LLP, 875 15th Street, N.W., Washington, D.C. 20005.
2. On the 24th day of July, 2009, I filed, by E-file, CNN America, Inc's Motion for Leave to File Supplemental Brief, with Henry S. Breiteneicher, Associate Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570.

3. On the 24th day of July, 2009, I served one true and correct copy of CNN America, Inc's Motion for Leave to File Supplemental Brief, by e- mail, on the following:

Gregory Beatty, Esq.
National Labor Relations Board
103 S. Gay Street, 8th Floor
Baltimore, MD 21202-4061
Gregory.beatty@nrlrb.gov

Dorothy C. Foley, Esq.
Allen Rose, Esq.
National Labor Relations Board
Region 2 – New York Resident Office
26 Federal Plaza – Room 3614
New York, NY 10278
Dorothy.foley@nrlrb.gov
Allen.rose@nrlrb.gov

Peter Chatilovicz, Esq.
Seyfarth Shaw
815 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20006
Attorneys for Team Video Services, LLC
pchatilovicz@seyfarth.com

Brian Powers, Esq.
O'Donoghue & O'Donoghue
4748 Wisconsin Avenue, N.W.
Washington, D.C. 20016
Attorneys for NABET-CWA Local 52031
bpowers@odonoghuelaw.com

David Biggar, Esq.
Region 18, National Labor Relations Board
330 Second Avenue South, Suite 790
Minneapolis, MN 55401
David.biggar@nrlrb.gov

Robert Marinovic, Esq.
Meyer, Suozzi, English & Klein, P.C.
1350 Broadway, Suite 501
New York, NY 10018
rmarinovic@msek.com
Attorneys for NABET Local 11

4. On the 24th day of July, 2009, I served one true and correct copy of CNN America, Inc's Motion for Leave to File Supplemental Brief, by overnight delivery on the following and notified the same by telephone at the numbers below:

Steve Sturm, Esq.
Sturm and Pearl
9 Wittman Drive
Katonah, NY 10536
(914) 299-4007


National Association of Broadcast Employees
and Technicians Local 11
145 West 30th Street, 12th Floor
New York, NY 10001
(212) 757-3065

Communications Workers of America, District 2
c/o Jimmy Tarleu, Esq.
17000 Science Drive, Ste. 210
Bowie, MD 20715
(301) 809-4160

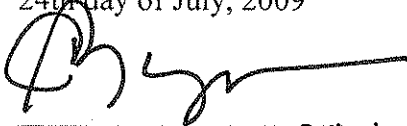
NABET-CWA Local 52031
962 Wayne, Suite 400
Silver Spring, MD 20910
(301) 495-4999

Mr. Larry D'Anna
Team Video Services, LLC
4455 Connecticut Avenue, N.W., Suite 300
Washington, DC 20008
(202) 363-1000

Matt Harris, Esq.
Communications Workers of America,
AFL-CIO
501 3rd Street, N.W., Suite 800
Washington, DC 20001
(202) 434-1100


Eric Engberg

Sworn to before me this
24th day of July, 2009



Notary Public

Catherine A. Bynum
Notary Public, District of Columbia
My Commission Expires 02/14/2010

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